Teaching Mens Rea with *Flores-Figueroa*: Using the Oral Argument to Unwrap the Case

Catherine Hancock*

I. A STRANGE BEGINNING

> If I say that John knowingly used a pair of scissors of his mother, I am saying not simply that John knew that he was using something which turned out to be his mother's scissors or even that John knew he was using scissors which turned out to be his mother's, I am saying that John knew that the scissors he was using belonged to his mother.[1]

Who would begin an oral argument in the United States Supreme Court this way? The answer is the skilled defense counsel in the case of *Flores-Figueroa v. United States*.[2] Why is it instructive to play excerpts from the oral arguments in this case for your students? One reason is because some of the ideas in these arguments foreshadow the reasoning used in the Court's opinion. It can be exciting, and even empowering, for students to experience the validation of spotting those ideas in the fast-paced conversations between counsel and the Justices.

Another good reason to study the wide-ranging oral arguments in *Flores-Figueroa* is because they serve to reveal what the Court's opinion conceals. Justice Breyer's opinion for the Court reads like a *per curiam* opinion. It is roughly 3,100 words and mentions only a few precedents.[3] All nine Justices agree with the result.[4] The Court's reasoning blandly describes only a few reasons why

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* Geoffrey C. Bible & Murray H. Bring Professor of Constitutional Law at Tulane University School of Law. I would like to thank Professor Ellen Podgor of Stetson University College of Law for the invitation to join the SEALS Discussion Group on Criminal Law Pedagogy and to thank Grishma Pradhan (Tulane class of 2013) and Lauren Peralta (Tulane class of 2014) for their assistance with research.

[1] Transcript of Oral Argument at 3, Flores-Figueroa v. United States, 556 U.S. 646 (2009) (No. 08-108, *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-108.pdf (including Kevin K. Russell's argument on behalf of Petitioner, at 3–27, 52–55, and Toby J. Heytens's argument on behalf of Respondent, 27–52).

[2] 556 U.S. 646 (2009).

[3] *See id.* at 652–53, 656 (discussing TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001); United States v. X-Citement Video, Inc., 513 U.S. 64 (1994); Liparota v. United States, 471 U.S. 419 (1985)).

[4] Justice Breyer's opinion for the Court was joined by Justices Stevens, Souter, Ginsburg, Kennedy, and Chief Justice Roberts. Justices Alito and Scalia wrote separate opinions concurring in the judgment, and Justice Thomas joined in Justice Scalia's opinion.

the mental state of "knowingly" should be interpreted as applying to the element "of another person" in the aggravated identity theft crime, 18 U.S.C. §1028A(a)(1): "Whoever, during and in relation to any [predicate felony violation], knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." These reasons include: 1) the "natural" reading according to the "ordinary usage" of English grammar; 2) the tradition of "ordinarily" applying a mental state to the elements that follow it; 3) the prediction that in "classic identity theft" cases, it will be "relatively easy" for government to prove the defendant's knowledge that ID information belongs to another person, and so there will be "no practical enforcement problem"; and 4) the inconclusive nature of the legislative history regarding the possible intent of Congress to permit conviction of people who lack such knowledge.[5]

The *Flores-Figueroa* case is not as simple as the Court's opinion suggests. The case raised an important issue in "crimmigration" law that split the circuits (three against three),[6] inspired the filing of seven amicus briefs,[7] and served as the litigation platform for an amazing variety of arguments about fundamental criminal law questions. Even though 1L students would find it difficult to understand every aspect of the briefs, the oral argument is neither too big nor too deep for them. The queries of the Court and responses of counsel are expressed with pithiness and candor, and their dialogues reveal that both counsel are well-prepared to satisfy the insatiable curiosity of the Justices.[8] At first, your students will enjoy the safety of the role of "armchair" listener, and as their comfort level grows, they will be curious as to whether you think that the advocates could have given better answers to some of the Justices' questions. Their curiosity will inspire them to join you on the quest to discover and discuss all the possible reasons that may explain why the Government lost the case.

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[5] *Flores-Figueroa*, 556 U.S. at 656–57 (concluding that the Court "cannot find indications in statements of its purpose or in the practical problems of enforcement sufficient to overcome the ordinary meaning, in English or through ordinary interpretive practice, of the words [Congress] wrote").

[6] *See* Petition for Writ of Certiorari at 7–13, *Flores Figueroa*, 556 U.S. 646 (No. 08-108), 2008 WL 2855747 (describing the pro-defendant positions of the First, Ninth, and D.C. Circuits, and the pro-government positions of the Fourth, Eighth, and Eleventh Circuits). For a multi-faceted analysis of the interaction of criminal law and immigration law, see Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010).

[7] *See infra* notes 25, 26, 29, 37, 41, and 42.

[8] For example, Petitioner's counsel informs the Court that there are one billion possible Social Security numbers and only 400 million of them have been assigned, and he notes that it is an open question in the circuits whether the ID information of a dead person is covered by the aggravated identity theft statute. Transcript of Oral Argument, *supra* note 1, at 17, 25.

II. TWO DOUBLE LIVES

The defendant, Ignacio Carlos Flores, lived a double life in two senses.[9] His first double life was that of a Mexican citizen who was "not authorized to reside or work in the United States," and who lived and worked here while managing to keep his illegal status invisible. Although he had applied for legal status "based on his marriage to a U.S. citizen," he "never successfully finished the application process."[10] Between 2000 and 2006, he worked at a steel mill in East Moline, Illinois. His employer knew him as Horatio Ramirez, and he obtained a job by providing a fake birth date and a fake resident alien card in his fake name, as well as a fake social security *number*.[11] Unbeknownst to him, both that number and the number on his fake alien card "belonged to no one."[12] This meant that although he was guilty of the immigration crimes of improper entry without inspection and misuse of immigration documents, he was not guilty of aggravated identity theft under § 1028A(a)(1), because that crime applies only to the use of identification information that belongs to other people.[13]

Flores's other double life consisted of his life "before and after" a fateful trip to Chicago, when he obtained two new ID cards that triggered his prosecution for two counts of aggravated identity theft, based on two "predicate" crimes of misuse of immigration documents. After spending six years as Horatio Ramirez, Flores decided that "he wanted to be known by his true name" and he wanted to obtain new cards to go with it. So in 2006, he traveled to Chicago to purchase a fake resident alien card (with his real photo) and a fake social security card, both in his true name of Ignacio C. Flores. This time, unbeknownst to him, the ID numbers on these cards actually belonged to two other people. Naturally, his employer was suspicious when Flores requested a new I-9 form and presented his new cards with both a new name and new numbers.[14] The employer alerted Immigration and Customs Enforcement, and an investigation led to Flores's arrest in Davenport, Iowa, across the river from East Moline, one year after his trip to Chicago.[15]

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[9] Most of the information provided here about the defendant does not appear in the Court's opinion.

[10] Brief of Appellee, United States v. Flores-Figueroa, 274 F. App'x. 501 (8th Cir. 2008) (No. 07-2871-SI), 2007 WL 468993, at *4 (citing pre-sentence report ¶ 8).

[11] *Id.* at *3 (citing pre-sentence report ¶ 4).

[12] Transcript of Oral Argument, *supra* note 1, at 19 (Justice Ginsburg's expression to describe the ID numbers in a case like *Flores-Figueroa*).

[13] *Cf.* 8 U.S.C. § 1325(a) (improper entry without inspection); 18 U.S.C. § 1546(a) (misuse of immigration documents); 18 U.S.C. § 1028A(1)(a) (aggravated identity theft).

[14] Note that the record indicates that Flores also presented a third new fake card to his employer, a *permanent* resident alien card with the same number as the new resident alien card presented with the new I-9 form. Brief of Appellee, *supra* note 10, at 3–4 (citing pre-sentence report ¶¶ 4–5). But this third card does not figure in the case.

[15] *Id.*. at 4–5 (citing pre-sentence report ¶¶ 4–8 and trial transcript pages 11–15 & 28). For a brief history of employer obligations to verify immigration status, see Marc Rosenblum & Lang

Flores was charged in a five-count indictment, and he decided to plead guilty to the one count of improper entry and the two counts of misuse of immigration documents.[16] He had no defense to these crimes because he had entered the country without inspection and he knew his two new ID *cards* were fake ones.[17] But he had a possible defense to the aggravated identity theft crime because of his ignorance that the numbers on the cards belonged to other people. So Flores went to trial on that crime, and after he testified about his ignorance, the prosecutor conceded that the Government could not prove that Flores "knowingly" used an ID "of another person." However, the district court determined that the statute did not demand such proof because the "knowingly" mens rea did not apply to the "of another person" element. Therefore, Flores was convicted, and after the Eighth Circuit endorsed the district court's statutory interpretation in another case, the circuit court affirmed Flores's conviction.[18] Flores's prison sentence for all three crimes was 75 months instead of 51 months, because of the mandatory consecutive two-year sentence for the aggravated identity theft conviction.[19] The fortuitous operation of this extra penalty is captured in an exchange between a federal prosecutor and a district court judge in another case,[20] which exchange is useful to share with your students because Government counsel in *Flores-Figueroa* was asked to comment on this dialogue:[21]

Hoyt, *The Basics of E-Verify, the US Employer Verification System*, MIGRATION INFORMATION, (July 2011), http://www.migrationinformation.org/feature/display.cfm?ID=846 (last visited Feb. 3, 2013).

[16] Transcript of Oral Argument, *supra* note 1, at 16. Although the Court's opinion refers to both the improper entry and misuse of documents crimes as "predicate offenses" under § 1028a(1)(a), only one such offense was required to indict Flores for the identity theft crime, and the two new fake cards were used "during and in relation to" the misuse of immigration documents crime, not the improper entry without inspection crime.

[17] *See* Brief of Appellant at 11, United States v. Flores-Figueroa, 274 F. App'x 501 (8th Cir. 2008) (No. 07-2871-SI) (original brief filed on 8th Circuit website, including addendum).

[18] At the time of Flores's trial and appeal, the Eighth Circuit had not yet taken a position on the issue in *Flores-Figueroa*. Then four months after the appellate briefs were filed, the court rejected Flores's position in *United States v. Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008), which as precedent dictated the result in *United States v. Flores-Figueroa*, 274 F. App'x 501 (8th Cir. 2008). *Cf.* Brief of Appellant, *supra* note 17, at 3–4 (relying on district court precedent); Brief of Appellee, *supra* note 10, at 10-13 (relying on Fourth Circuit precedent).

[19] The defendant was convicted of two counts of aggravated identity theft and received the same two-year penalty on each count, but these two sentences were imposed to "run concurrent to each other." Brief of Appellant, *supra* note 17, at 12. The maximum sentence for misuse of immigration documents was ten years, and Flores received 55 months for the two counts, to run concurrently with the six months for improper entry. *Id.*

[20] United States v. Villanueva-Sotelo, 515 F.3d 1234, 1237 (D.C. Cir. 2008) (quoting exchange between District Judge Friedman and the federal prosecutor, which the judge later described as "illuminating" in his ruling that "knowingly" should apply to the "of another person" element).

[21] Transcript of Oral Argument, *supra* note 1, at 28, 43–44 (Justice Ginsburg initially asked Government counsel whether the prosecutor in *Villanueva-Sotelo* gave "the right answer" to Judge Friedman's hypothetical, and later asked counsel whether that answer showed that the statute was ambiguous).

> [Prosecutor]: [I]t is stealing in the sense that if I make up a number and it belongs to someone else, I have taken that person's number that was rightfully assigned by a U.S. agency.
> The Court: If you make up the number?
> [Prosecutor]: Yes. If I –
> The Court: What if you make up a number that doesn't belong to anybody?
> [Prosecutor]: Then you don't charge the offense, there is no offense because it's not a means of identification of another person.
> The Court: So if the defendant picked a number out of the air and it was [your] number, he's guilty, but if he picked a number out of the air and [Immigration and Customs Enforcement] hasn't assigned it to anybody, he's not guilty?
> [Prosecutor]: That's correct.

III. THE MENS REA CHOICES: "KNOWINGLY" OR STRICT LIABILITY

The strange beginning of the oral argument by Flores's counsel is likely to provoke startled looks from your students, as they ponder the meaning of the statement that "John *knowingly* used the scissors *of* his mother." During the next four minutes, you may even hear suppressed laughter, as your students react to the repetitious questions about the meaning of sentences that include the word "knowingly." Chief Justice Roberts, Justice Alito, and Justice Scalia are each interested in some variation of this example: "Someone *knowingly* stole the car *that belonged to* Mr. Jones." Does the speaker mean that the thief knew the car belonged to Mr. Jones? Or only that the car turned out to belong to Mr. Jones? Flores's counsel agrees that this sentence "gives rise to a little bit more ambiguity" than, presumably, either the "scissors" example or the statutory text. But he counters that "it's not particularly ambiguous" to say, "John knowingly stole the car *of* Mr. Jones," which sentence "strongly implies that John knew that the car belonged to Mr. Jones." Then counsel adds, in the spirit of pragmatism, "We don't claim that the government's interpretation is grammatically impossible."[22] This concession provokes another example from Justice Alito: "Who did the mugger mug? [He] knowingly mugged the man from Denver. You think that means that the mugger knew that the man was from Denver?" Counsel replies, "[T]hat's a more ambiguous statement . . . [b]ecause [of] the 'from' preposition[,] . . . [whereas] the possessive form [*of* Mr. Jones] makes it, through common usage, unambiguous."[23] As the Justices continue to offer examples, demand answers, and ignore counsel's proffered distinctions and explications of grammar rules, your students may wonder whether it is normal for the courtroom audience to laugh

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[22] *Id.* at 4–5.

[23] *Id.* at 5–6.

repeatedly during the argument, and for some of the Justices to play for those laughs.[24]

Fortunately, Justice Breyer cuts off the "game of sentences" with his abrupt question, "Well, so what if it [the statute] isn't [unambiguous]?" Then he asks leading questions in order to prompt Flores's counsel to acknowledge that, "We have more than one argument," and to move on to his argument that "in a criminal statute, you ordinarily assume[,] this Court has said[,] that a conventional mens rea element extends to all the elements of the offense."[25] The conversation quickly turns more adversarial, thanks to an opening provided by Justice Ginsburg, who asks, innocently enough: "[A]m I correct in understanding that the government goes with you almost all the way, and . . . [that] they agree that 'knowingly' applies to [the elements of] 'without lawful authority' and 'a means of identification'?" Counsel seizes the moment and puts on his gloves:

> As I understand it, that is not their position. That's the back up to their back up position. [Their] first position is that [knowingly] only applies to the verbs, and then they say, well, if you don't accept that, well maybe it goes through "without lawful authority." And if you don't accept that, then maybe then it goes halfway through the phrase "means of identification of another person."[26]

Press the pause button and ask your students, "How do you think Government counsel feels about this characterization of the Government's argument?" They will recognize that so many "back up" positions may seem excessive, and they may wonder why the Government counsel did not take the simpler and more credible position described in Justice Ginsburg's question. At this point, you can explain that it is traditional for the Government to defend its winning position in the lower court, and that the Eighth Circuit and two other circuits had endorsed the Government's narrowest position that the adverb "knowingly" "only applies to the verbs."[27]

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[24] *Id.* at 17, 54 (during Petitioner's argument); *id.* at 41, 47 (during Government argument).

[25] *Id.* at 6–7. *Cf.* Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 3-15, Flores-Figueroa v. United States, 556 U.S. 646 (No. 08-108), 2008 WL 5369546. For recent debate concerning this principle, see Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* 28 (May 5, 2010), http://www.heritage.org/research/reports/2010/05/without-intent (last visited Feb. 3, 2013) (proposing federal law requiring federal courts to apply "any introductory or blanket *mens rea* terms in a criminal offense to each element of the offense"); Geraldine Szott Moohr, *Playing with the Rules: An Effort to Strengthen the Mens Rea Standards of Federal Criminal Laws*, 7 J.L., ECON. & POL'Y 685, 704–07 (2011) (criticizing this proposal).

[26] Transcript of Oral Argument, *supra* note 1, at 7–8. *Cf.* Brief of Professors of Linguistics as Amici Curiae in Support of Neither Party at 4–15, *Flores-Figueroa*, 556 U.S. 646 (No. 08-108), 2008 WL 5394023 (rebutting Government's interpretation of statute).

[27] *See* Petition for Writ of Certiorari, *supra* note 6, at 11. In his questions for Government counsel, Justice Souter characterized the Government's "narrowest" position as "not a serious

Now ask your students, "So if the Government does *not* want the Court to treat 'knowingly' as the implicit mental state for the 'of-another-person' element, then what implicit mental state *does* the Government want the Court to endorse instead?" The answer, of course, is strict liability, which term never appears in either the Court's opinion or the Government counsel's argument. By contrast, Flores's counsel recognizes the value of making explicit references to "strict liability," in order to call the Court's attention to the reasons why Congress would not choose to use this disfavored mental state without making such a choice clear in the statutory text. These explicit references occur during the final third of his argument,[28] and earlier comments also conjure up the shadow of "strict liability." Such a shadow appears soon after his subtle mockery of the Government's three linguistic positions. Just for one moment, the Justices hold their questions long enough for Flores's counsel to catch a wave at last, as he articulates the proposition at the heart of his case:

> The only reason that the government alleges there is a crime here is because it turned out that those [ID] numbers had been assigned to somebody else. Under our view, that's not enough. That's enough to show that he committed the predicate offenses, and he received very substantial punishment for that, but it's not enough to show that he was qualified for an additional two years mandatory sentence as an aggravated identity thief.[29]

These highlights from the first six minutes of argument by Flores's counsel[30] illustrate its usefulness as a source for understanding the competing statutory interpretations of the parties, and the rationales in Justice Breyer's opinion concerning "ordinary usage" and the tradition of the "traveling" mental state.[31] Two other useful excerpts can be combined to offer your students a seven-minute defense argument,[32] which can be compared to a seven-minute counterpoint at the

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possibility" because the term knowingly "has to refer to something more than the three possible acts." Then Justice Souter characterized the Government's so-called "first back up" position as creating "an arbitrary line" and the so-called "second back up" position as ignoring the "real object" or "operative description" of the statute," namely "a means of identification of another person." Transcript of Oral Argument, *supra* note 1, at 37–38. For an explication of the grammar analysis of the pro-government circuit courts, see Darryl K. Brown, *Federal Mens Rea Interpretation and the Limits of Culpability's Relevance*, 75 LAW & CONTEMP. PROBS. 109, 117–120 (2012).

[28] The defense counsel first mentions "strict liability" after 18 minutes of his 26-minute argument, and then mentions it four more times. *See* Transcript of Oral Argument, *supra* note 1, at 20, 22–24.

[29] *Id.* at 9. *Cf.* Brief of Amici Curiae Professors of Criminal Law in Support of Petitioner at 3–10, 22-29, *Flores-Figueroa*, 556 U.S. 646 (No. 08-108), 2008 WL 5369545.

[30] Transcript of Oral Argument, *supra* note 1, at 1–9.

[31] This episode also includes questions from Justice Alito that foreshadow the reasoning of his concurrence.

[32] Transcript of Oral Argument, *supra* note 1, at 18–20, 23–27.

end of the Government's argument.[33] The debate revealed in these excerpts will take your students further into the terrain of ideas that bear upon the choice facing the Court: whether to interpret the identity theft statute to mean "[t]he fact that there is a real victim gets you two years" or "you get two years for knowing that there is a [real] victim."[34]

IV. CLASSIC IDENTITY THEFT AND ANOMALOUS PENALTIES FOR UNKNOWING THIEVES

One of the most important reasons that the government lost the case is because Congress tossed the misuse of immigration documents crime into the same "predicate felony" bucket as a large number of offenses involving defendants who necessarily know that they have used another person's ID information "during and in relation to" their crimes.[35] Flores's crime could be committed either with such knowledge or without it, and therefore, by comparison with the many predicate offenses presupposing knowledge, his extra punishment for unknowing identity theft may be viewed as an anomaly.[36] Flores's counsel implicitly urges the Court to infer that Congress assumed that knowledge of a victim's existence would be required for conviction of aggravated identity theft, given the character of the many crimes that Congress put in the bucket. This theme is dramatized in the two-minute episode in which counsel describes three "classic" identity thieves—the dumpster diver, the person who obtains unauthorized access into a computer system, and the person who breaks into an online bank account. These thieves do

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[33] *Id.* at 45–52.

[34] The first quoted statement is made by counsel for the Government, after describing how the penalty of "two years and exactly two years" showed that Congress "thought there was a discreet [sic] measure of punishment that was appropriate to reflect the presence of a real victim." The second quoted statement is by Justice Scalia, who subsequently opines that "you can describe" what Congress wanted "either way." *Id.* at 49.

[35] The Court's opinion mentions these other crimes only in general terms, and therefore it is useful to give students the entire list of predicate felonies as defined in 18 U.S.C. § 1028A(1)(c). *See* Flores-Figueroa v. United States, 556 U.S. 646, 648 (2009) (mentioning "theft of government property, fraud," and "unlawful activities related to passports, visas, and immigration"). Note that the Court's opinion observes that "the examples of theft that Congress gives in the legislative history all involve instances where the offender would know that what he has taken identifies a different real person." *Id.* at 655.

[36] Flores's Eighth Circuit counsel implicitly portrayed his predicate offense of misusing immigration documents as an anomaly in arguing that the Government's strict liability position was "an example of prosecutors creatively using [the identity theft] statute to gain an enhancement in immigration cases which was never intended by Congress" to support the "absurd result" that "almost any charge of the use of a false document will carry the enhancement of two years." Brief of Appellant, *supra* note 17, at 5. Counsel relied on United States v. Beachem, 399 F. Supp. 2d 1156, 1158 (W.D. Wash. 2005) (criticizing United States v. Montejo, 353 F. Supp. 2d 643, 644–45 (E.D. Va. 2005), for finding that "the legislative history of the statute, the title of the statute, and the somewhat absurd level of punishment reached under the statute did not matter as much as the statute's plain language").

not resemble Flores because none of them would seek to use the ID information "of a nonexistent person." Unlike Flores, these "classic" identity thieves commit the kinds of predicate crimes "that Congress was most concerned about"[37] when establishing the extra mandatory two-year penalty. Moreover, these predicate crimes involve "powerful circumstantial evidence of knowledge" that will assure conviction.[38] Your students will recognize how these arguments establish a foundation for the Court's conclusion that the "knowingly" mens rea creates "no practical enforcement problem" for the prosecution of "classic" identity thieves.[39]

Counsel for the Government must persuade the Court that Flores's unknowing crime is not an anomaly in the "predicate felony" bucket. Counsel's premise is that Congress cared nothing about any defendant's awareness of a victim's existence when enacting the aggravated identity theft statute. Instead, Congress enacted the statute based on the determination that all of the "predicate crime" defendants, including the unknowing ones like Flores, were "not receiving sufficient punishment" whenever "there was a real person who was harmed" by any identity theft.[40] Implicitly, Congress intended to value the identity-theft harms to all victims as deserving the same extra two-year punishment because of "the fundamentally victim-focused nature" of the statute. Necessarily, then, Congress intended to ignore the "culpability" differences between defendants who knowingly harm a victim and those who do so without knowing that the victim exists.[41] These are the themes that are pursued by Government counsel.

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[37] Transcript of Oral Argument, *supra* note 1, at 19. *Cf.* Brief of Amici Curiae Electronic Privacy Information Center (EPIC) and Legal Scholars and Technical Experts in Support of Petitioner at 8–18, *Flores-Figueroa*, 556 U.S. 646 (No. 08-108), 2008 WL 5369547 (arguing that "identity theft" has well known meaning in "[i]nformation [s]cience" community and does not include the "unknowing use of inaccurate credentials").

[38] Transcript of Oral Argument, *supra* note 1, at 19. *See also id.* at 20 (arguing that the government will face no "insurmountable burden in proving knowledge in a way that's particularly different [from] other kinds of situations in which the law commonly requires the government to prove what a defendant knew").

[39] *Cf. Flores-Figueroa*, 556 U.S. at 655–56. Note that Congress has not amended §1028A(a)(1) in response to *Flores-Figueroa*. For an analysis of the impact of the decision on the federal courts, see Leonid Traps, Note, *"Knowingly" Ignorant: Mens Rea Distribution in Federal Criminal Law After* Flores-Figueroa, 12 COLUM. L. REV. 628 (2012).

[40] Transcript of Oral Argument, *supra* note 1, at 48. Or, as Government counsel puts it later in his argument, the pro-defendant lower courts "went wrong" when they asked the question "whether it would be natural to refer to someone like Petitioner as a thief," because they should have asked the question "whether it would be at all unusual to refer to the two innocent people whose [ID] numbers [were] used to facilitate [two] underlying felonies [as] the victims of identity theft." *Id.* at 51–52 (alluding to District Judge Hornby's description of "innocent victims" in *United States v. Godin*, 489 F. Supp. 2d 118, 121 (D. Me. 2007) (holding proof of knowledge not required), *rev'd*, 534 F.3d 51 (1st Cir. 2008) (holding proof of knowledge required)).

[41] Transcript of Oral Argument, *supra* note 1, at 50. *See* Brief for the United States, *Flores-Figueroa*, 556 U.S. 646 (No. 08-108), 2009 WL 191837, at 19-32. *Cf.* Brief of the Maryland Crime Victims' Resource Center Inc., et al, as *Amicus Curiae* in Support of Respondent, *Flores-Figueroa*, 556 U.S. 646 (No. 08-108), 2008 WL 230941.

Flores's counsel seeks to rebut the Government's ideas in advance, and his anticipatory rebuttal is presented during the last five minutes of his argument, and encapsulated in this speech:

> I do think it's a fair point, that this is a statute that's concerned with victims. Lots of criminal statutes are. [But] Congress doesn't ordinarily enact even victim-focused statutes without mens rea requirements, and courts don't ordinarily . . . construe them [that way], even though [that] furthers the purpose of protecting victims. [F]ar more commonly[,] we don't hold defendants criminally strictly liable for all the consequences of their crimes . . . . Now, Congress could make a different choice. . . . But our point is simply there are reasons why Congress might not do that, including the anomalous kind of penalties that end up being meted out here, where you have people—two people with identical culpability ending up with substantially different punishments, or people with substantially different culpability ending up with identical punishments. If you have the classic aggravated identity thief who breaks into a bank account using a means of identification he knows belongs to somebody else, it's exactly the same sentence, under the government's view, as somebody like Petitioner who just unknowingly used a number in order to get a job.[42]

In short, Flores's counsel argues that the Court should reject the Government's "criminal law world" in which these particular punishment anomalies are acceptable to Congress and to the courts. Instead, the Court should validate the traditional world in which Congress would reject such anomalies in favor of adherence to principles of proportionality and comparative culpability. In that world, the unknowing Flores has been punished enough, and identity-theft victims will be protected enough by that punishment.[43] Does the Court's opinion

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[42] Transcript of Oral Argument, *supra* note 1, at 23–24. Counsel does not allude explicitly to the anomalies in punishment based on prosecutorial discretion, but examples are provided in the Brief of Amici Curiae Advocates for Human Rights [and] American Immigration Lawyers Association et al, in Support of Petitioner at 9–20, *Flores-Figueroa*, 556 U.S. 646 (No. 08-108), 2008 WL 5369544 (describing arrest of 390 workers in ICE raid in Postville, Iowa, when prosecutors offered plea bargains with probation to defendants who committed predicate misuse of documents crime with fictional ID numbers on cards, and offered plea bargains with prison sentences to defendants committing same crime with real ID numbers that established aggravated identity theft crime). For other criticism of anomalous sentences, see Brief for the Mexican American Legal Defense and Educational Fund and the United States Hispanic Chamber of Commerce as Amicus Curiae in Support of Petitioner at 7–14, *Flores-Figueroa*, 556 U.S. 646 (No. 08-108), 2008 WL 5409460. *Cf.* Robert R. Rigg, *The Postville Raid: A Postmortem*, 12 RUTGERS RACE & L. REV. 271 (2011); Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307 (2009).

[43] Note that some of the questions at oral argument invite counsel to explain why implicit proportionality was or was not envisioned by Congress. For example, Justice Stevens said to Flores's counsel, "[As] I understand your theory[,] there are two basic kinds of crimes. You just use the document for your own source if you want to get the job or you want entry into the country or

speak to the conflict between these worlds? Not in so many words. Did the portrayal of this conflict between "worlds of criminal law" matter to some of the Justices? Your students are likely to think so.

V. THE DRAMA OF NAVIGATING THE REALMS OF LAWYERING IDEAS

We say that a good novelist knows how to "show not tell" a story, and a good oral argument will do more than illustrate how the judges and counsel for the parties chose to perform their speaking roles on a given day in court.[44] It will serve to "show" live lawyering in action, and teach students how to imitate the making of arguments that draw upon all realms of lawyering ideas. The smallest realm of ideas is inhabited by the judicial opinion that students are called upon to scrutinize, to comprehend, and to remember. But students need to learn how a much larger realm of ideas occupied "the minds of counsel for the parties," as reflected in the content of their briefs and oral arguments, as well as historical sources.[45] An even larger realm of ideas occupied "the minds of the judges," and students need to learn how effective advocates must become familiar with all the ideas that may illuminate judicial concerns about the controversy, whether they may be found in

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something like that. That's a minor crime. But [it is] identity theft where you are pretending to be somebody else so you can get advantage of his credit and his assets and his access to computers. That's a much more serious crime." Transcript of Oral Argument, *supra* note 1, at 25–26. Justice Ginsburg said to the Government counsel that, "[H]omicide is [an] answer to your argument that this statute is entirely victim-centered, because a person is just as dead if he's the victim of a reckless driver as a premeditated murder, and yet we certainly distinguish the penalties in those cases, no matter that the harm was identical." *Id.* at 30. Justice Souter said to Government counsel, "The only thing that we know for sure is that Congress said it's not worth two years' extra unless [the ID information] of another person was involved. And if that is what is so significant or necessarily significant in getting a two-year add-on, then it seems reasonable to suppose that Congress thought that the state of mind had to touch that." *Id.* at 39. In response to Government counsel's argument that victims suffer the same harm from identity theft, regardless of the defendant's mental state, Chief Justice Roberts observed, "Well, but in that case, you tell them, look, the person's got 10 years [for the crime of misusing immigration documents]. Right? I mean, if they find the guy, he's going to face up to 10 years for identity fraud." *Id.* at 48. *See* Brown, *supra* note 27, at 111, 116–122, 130–31 (explaining *Flores-Figueroa* as a "proportionate culpability" precedent).

[44] All the Justices participated in the *Flores-Figueroa* argument except for Justice Thomas.

[45] In its broadest sense, the "minds of counsel" realm of ideas may include revelations to be found in interviews or in the commentary of counsel in the historical record. For a recent work that draws upon a rich array of such ideas, see DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* (2012). Even in the narrower sense, the traditional realm of ideas in the briefs and arguments of counsel may be very broad, as in *Flores-Figueroa*. Yet many of the principles and precedents relied on by counsel were not mentioned in the Court's opinion. *See* Eric A. Johnson, *Does Criminal Law Matter? Thoughts on* Dean v. United States *and* Flores-Figueroa v. United States, 8 OHIO ST. J. CRIM. L. 123, 125–27, 138–47 (2010) (criticizing the opinion for neglecting these ideas).

the record that includes lower court opinions and amicus briefs, or in extra-record material, such as other judicial opinions and commentary.[46]

When students witness an argument in slow motion, punctuated by your observations and questions for discussion, they can walk in the footsteps of counsel in order to learn to recognize the sources of their ideas. As your students take on the role of apprentices to the lawyers in an oral argument, whose voices they can hear and whose choices they can discuss, they will experience the move from the hypothetical to the real, or as close to the real as they can get within the friendly confines of the classroom. By allowing students to practice the "doing" of law in unique ways, the study of an oral argument will activate and expand their abilities to imagine how law may be "done." A good oral argument will show your students how to imitate the thinking and talking of the lawyers who tried to make the best choices they could, in selecting their ideas with discernment and creativity from the vast supply of potentially relevant legal thought.

[46] Here are some examples of questions in the *Flores-Figueroa* argument that called for answers to be derived from sources in "the minds of the judges" realm of ideas. Justice Alito asked whether the statute would allow a jury to convict a defendant who obtained a fake card in a name that is "not an extremely common name but not an extremely uncommon name." Transcript of Oral Argument, *supra* note 1, at 15. Justice Ginsburg asked whether "[there] are outfits that specialize in making false identification." *Id.* at 18. Justice Kennedy asked whether the aggravated identity theft statute would apply to a defendant who used a card with the number "belonging to a dead person[.]" *Id.* at 25. Justice Breyer asked whether there was a particularly strong argument for applying "a Rule of Lenity with bite" in the case of "mandatory minimum sentences." *Id.* at 42. Chief Justice Roberts asked whether it mattered that the statute calls the crime "identity theft" but "doesn't say anything about victims." *Id.* at 52.